Finding a Place for Data in the Patent Troll Debate

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Date : June 24, 2010

Colleen Chien, Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents, 87 **N.C. L. Rev. 1571** (2009), available at SSRN.

Patent lawyers, like many of our kind, are obsessed with classifications, determinations, and definitions: is a patent claim a true invention or is it part of the prior art? Is it an abstract idea or a specific method? Does it claim a means or a function? In fact, the very notion of intellectual "property" is premised on the idea that we can discern one category of things from another in order to establish metes and bounds and enforce exclusion.

No patent classification schema has been more controversial in recent years than that applied to patent litigation plaintiffs that do not make, use, sell or offer for sale a product or service. Are they trolls or investors? Are they rent-seekers or research incubators? Are they pests or pioneers? Such rhetoric has filled essays, academic articles, courtrooms and legislative halls without much actual evidence to support one characterization versus another.

Thus, it was refreshing to read Colleen Chien's "Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents", 87 N.C. L. Rev. 1571 (2009). In this article, Chien looks beyond the mere labels applied to patent plaintiffs and studies actual data from cases filed to discern the narratives, practices, and strategies that could legitimately distinguish one patent plaintiff from another.[1] The article also demonstrates the fruits born by the enormous effort of Stanford's Intellectual Property Litigation Clearinghouse to collect and make available data on U.S. patent litigation.

Chien's key contribution is taking the narratives of Trolls (or "non-practicing entities" – NPEs), Davids, Goliaths, and Kings and applying context to them via data. In other words, she tells us how much we might care about a given narrative by looking at the actual practices of those entities instead of the rhetoric or the hype. As she notes in her introduction, "Although the 'squeakist wheel'—that is, the patent story that gets the most attention—may deserve the grease, without data it's hard to be sure." Chien breaks the data down into meaningful categories based on who sues whom and the size and revenue of each party.

So who deserves the grease? According to Chien, non-NPE corporations still bring the largest number of patent lawsuits (76%) and thus, the Sport of Kings (multiple-patent, often multiple-venue, lawsuits between large corporations) remains a strong narrative. Yet Trolls still deserve the attention they are receiving, not for their sheer numbers perhaps, but instead for their growing business model. The data shows that NPEs account for 17% of all high-tech patent lawsuits from 2001-2008, with the numbers of cases and defendants-sued-per-case increasing over time. This was particularly true with financial patents – 26% of all financial patent suits were initiated by NPEs – where decisions such as *State Street Bank & Trust Co. v. Signature Financial Group*, 149 F. 3d 1368 (Fed. Cir. 1998) broadened and reinforced the scope of patentable subject matter for financial methods and products.

Chien also uses the data to call into question "defensive patenting" – a practice of patenting to prevent offensive lawsuits via a strategy of détente instead of patenting to pursue licensing fees or exclusion – noting that the high number of large corporate suits suggests it may be failing to prevent such litigation.

In the end, I found Chien's paper useful and interesting not so much for its conclusions (she is understandably conservative about how far the data can take us), but for its forthright attempt to challenge the narratives that patent lawyers have historically relied upon to make their policy points and rhetorical courtroom arguments. Mapping data to these narratives provides much needed insight into the real practices in the world of patent litigation and leaves us much better informed about the trends and trajectories to consider when entering any conversation about patent reform. For those who wish to tread on this ground, I highly recommend this article as a primer to help orient the conversation.

1. It is worth noting that Chien limits her study to software, hardware, and financial patents, as those are the categories where plaintiff classification has been the most contested.

Cite as: Jason Schultz, *Finding a Place for Data in the Patent Troll Debate*, JOTWELL (June 24, 2010) (reviewing Colleen Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 **N.C. L. Rev. 1571** (2009), available at SSRN), https://ip.jotwell.com/finding-a-place-for-data-in-the-patent-troll-debate/.